IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.06.2007

CORAM

THE HON'BLE MR.JUSTICE P.D.DINAKARAN
AND
THE HON'BLE MR.JUSTICE P.P.S.JANARTHANA RAJA

T.C.(A).Nos.639 to 642 of 2007

Commissioner of Income Tax
Chennai. .. Appellant in all the appeals

Vs.

M/s. Giza Impex P. Ltd.
73, Nungambakkam High Road,
Chennai. .. Respondent in all the appeals

Appeals under Section 260A of the Income Tax Act, 1961 against the of the Income Tax Appellate Tribunal,made in ITA Nos.1363 & 1364/Mds/2002 and 1135 & 1136/Mds/2005 for the dated 17.2.2006, and and against the order of the commissioner of Income-Tax (Appeals)made in ITA.No.129 and 130/04-05, dated 2.2.2005 and against the assessment order for years 1997-98 dated 24.2.2004, 1996-97 dated 15.2.2004 order of the commissioner of Income Tax (Appeals) in ITA.No.127 and 128/2001-02 dated 28.5.2002 against the assessment year 1995-96 dated 26.6.2001 and 1994-95 dated 26.6.2001 respectively.

For Appellant : Mrs. Pushya Sitaraman
Sr. Standing Counsel

J U D G M E N T
(Delivered by P.D.DINAKARAN, J.)

The above tax case appeals are directed against the common order of the Income-tax Appellate Tribunal dated 17.2.2006 made in ITA Nos.1363 & 1364/Mds/2002 and 1135 & 1136/Mds/2005 for the assessment years 1994-95 to 1997-98 respectively, raising the following common substantial questions of law:

"1. Whether in the facts and circumstances of the case, the Tribunal was right in holding that there was no dispute about the allowability of deduction under section 80HHC in respect of the transfer/export of the master copies of the film songs and music along with

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the rights to make copies and sell cassettes outside India.

2. Whether in the facts and circumstances of the case, the Tribunal was right in treating the transfer/export of the master copies of the film songs and music along with the rights to make copies and sell cassettes outside India as a sale of goods or merchandise for the purpose of deduction under section 80HHC?

2.1. The Revenue is the appellant. The relevant assessment years are 1994-95 to 1997-98. The assessee is a company engaged in the business of export of Digital Audio Tape Master (DAT Master) containing the recorded version of film songs from Tamil feature films for exploitation overseas and the assessee claimed deduction under Section 80HHC of the Income Tax Act (for brevity, "the Act"). The Assessing Officer disallowed the claim of the deduction under Section 80HHC of the Act on the ground that the exploitation rights in the film songs and music in feature films to overseas assignee would not constitute export of goods for the purpose of deduction under Section 80HHC of the Act.

2.2. On appeals by the assessee, the Commissioner of Income Tax (Appeals) allowed the appeals directing the Assessing Officer to allow deduction under Section 80HHC of the Act.

2.3. On further appeals by the Revenue, the Tribunal following the decision of the Bombay High Court in Abdulgafar A.Nadiadwala v. Assistant Commissioner of Income Tax and Others, [2004] 267 ITR 488 allowed the appeals in favour of the assessee. Hence the present appeals.

3. Mrs.Pushya Sitaraman, learned Senior Standing Counsel for the appellant contends that the deduction under Section 80HHC of the Act is applicable only for profits derived from export of goods and merchandise, and thus cannot apply to the transaction of the assessee, who has not exported any goods or merchandise, but only the master copies of film songs and music along with the rights to make copies and sell cassettes outside India.

4. In this regard, it would be apposite to determine whether the product involved in these cases can be said to be "goods" and/or "merchandise", as defined under Section 80HHC of the Act or not?

5. At this juncture, a reference to Section 80HHC of the Act is essential:

"Section.80HHC. Deduction in respect of profits retained for export business.--(1) Where an assessee, being an Indian company or a person (other than a company) resident in India, is engaged in the business of export out of India of any goods or merchandise to which this section applies, there shall, in accordance with and

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subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of the profits derived by the assessee from the export of such goods or merchandise:

.....

(2)(a) This section applies to all goods or merchandise, other than those specified in clause (b), if the sale proceeds of such goods or merchandise exported out of India are received in, or brought into, India by the assessee (other than the supporting manufacturer) in convertible foreign exchange, within a period of six months from the end of the previous year or, ~within such further period as the competent authority may allow in this behalf.

Explanation.--For the purposes of this clause, the expression "competent authority" means the Reserve Bank of India or such other authority as is authorised under any law for the time being in force for regulating payments and dealings in foreign exchange.

(b) This section does not apply to the following goods or merchandise, namely:--

(i) mineral oil; and

(ii) minerals and ores (other than processed minerals and ores specified in the Twelfth Schedule).

Explanation 1.--The sale proceeds referred to in clause (a) shall be deemed to have been received in India where such sale proceeds are credited to a separate account maintained for the purpose by the assessee with any bank outside India with the approval of the Reserve Bank of India.

Explanation 2.--For the removal of doubts, it is hereby declared that where any goods or merchandise are transferred by an assessee to branch, office, warehouse or any other establishment of the assessee situate outside India and such goods or merchandise are sold from such branch, office, warehouse or establishment, then, such transfer shall be deemed to be export out of India of such goods and merchandise and the value of such goods or merchandise declared in the shipping bill or bill of export as referred to in sub-section (1) of section 50 of the Customs Act, 1962 (52 of 1962), shall, for the purposes of this section, be deemed to be the sale proceeds thereof.

(3) For the purposes of sub-section (1),--

(a) where the export out of India is of goods or merchandise manufactured or processed by the assessee, the profits derived from such export shall be the amount which bears to the profits of the

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business, the same proportion as the export turnover in respect of such goods bears to the total turnover of the business carried on by the assessee ;

(b) where the export out of India is of trading goods, the profits derived from such export shall be the export turnover in respect of such trading goods as reduced by the direct costs and indirect costs attributable to such export ;

(c) where the export out of India is of goods or merchandise manufactured or processed by the assessee and of trading goods, the profits derived from such export shall,--

(i) in respect of the goods or merchandise manufactured or processed by the assessee, be the amount which bears to the adjusted profits of the business, the same proportion as the adjusted export turnover in respect of such goods bears to the adjusted total turnover of the business carried on by the assessee ; and

(ii) in respect of trading goods, be the export turnover in respect of such trading goods as reduced by the direct and indirect costs attributable to export of such trading goods :

Provided that the profits computed under clause (a) or clause (b) or clause (c) of this sub-section shall be further increased by the amount which bears to ninety per cent of any sum referred to in clause (iiia) (not being profits on sale of a licence acquired from any other person), and clauses (iiib) and (iiic) of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee.

Provided further that in the case of an assessee having export turnover not exceeding rupees ten crores during the previous year, the profits computed under clause (a) or clause (b) or clause (c) of this sub-section or after giving effect to the first proviso, as the case may be, shall be further increased by the amount which bears to ninety per cent. of any sum referred to in clause (iiid) or clause (iiie), as the case may be, of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee :

Provided also that in the case of an assessee having export turnover exceeding rupees ten crores during the previous year, the profits computed under clause (a) or clause (b) or clause (c) of this sub-section or after giving effect to the first proviso, as the case may be, shall be further increased by the amount which bears to ninety per cent. of any sum referred to in clause (iiid) of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee, if

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the assessee has necessary and sufficient evidence to prove that, -

(a) he had an option to choose either the duty drawback or the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme; and

(b) the rate of drawback credit attributable to the customs duty was higher than the rate of credit allowable under the Duty Entitlement Pass Book Scheme, being Duty Remission Scheme :

Provided also that in the case of an assessee having export turnover exceeding rupees ten crores during the previous year, the profits computed under clause (a) or clause (b) or clause (c) of this sub-section or after giving effect to the first proviso, as the case may be, shall be further increased by the amount which bears to ninety per cent. of any sum referred to in clause (iiie) of section 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee, if the assessee has necessary and sufficient evidence to prove that, -

(a) he had an option to choose either the duty drawback or the Duty Free Replenishment Certificate, being Duty Remission Scheme; and

(b) the rate of drawback credit attributable to the customs duty was higher than the rate of credit allowance under the duty Free Replenishment Certificate, being Duty Remission Scheme.

Explanation. - For the purposes of this clause, "rate of credit allowable" means the rate of credit allowable under the Duty Free replenishment Certificate, being the Duty Remission Scheme calculated in the manner as may be notified by the Central Government.

Explanation.--For the purposes of this sub-section,--

(a) "adjusted export turnover" means the export turnover as reduced by the export turnover in respect of trading goods ;

(b) "adjusted profits of the business" means the profits of the business as reduced by the profits derived from the business of export out of India of trading goods as computed in the manner provided in clause (b) of sub-section (3) ;

(c) "adjusted total turnover" means the total turnover of the business as reduced by the export turnover in respect of trading goods ;

(d) "direct costs" means costs directly attributable to the trading goods exported out of India including the purchase price of such goods ;

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(e) "indirect costs" means costs, not being direct costs, allocated in the ratio of the export turnover in respect of trading goods to the total turnover ;

(f) "trading goods" means goods which are not manufactured or processed by the assessee.

(3A) For the purposes of sub-section (1A), profits derived by a supporting manufacturer from the sale of goods or merchandise shall be,--

(a) in a case where the business carried on by the supporting manufacturer consists exclusively of sale of goods or merchandise to one or more Export Houses or Trading Houses, the profits of the business;

(b) in a case where the business carried on by the supporting manufacturer does not consist exclusively of sale of goods or merchandise to one or more Export Houses or Trading Houses, the amount which bears to the profits of the business the same proportion as the turnover in respect of sale to the respective Export House or Trading House bears to the total turnover of the business carried on by the assessee.

(4) The deduction under sub-section (1) shall not be admissible unless the assessee furnishes in the prescribed form along with the return of income, the report of an accountant, as defined in the Explanation below sub-section (2) of section 288, certifying that the deduction has been correctly claimed in accordance with the provisions of this section.

(4A) The deduction under sub-section (1A) shall not be admissible unless the supporting manufacturer furnishes in the prescribed form along with his return of income,--

(a) the report of an accountant, as defined in the Explanation below sub-section (2) of section 288, certifying that the deduction has been correctly claimed on the basis of the profits of the supporting manufacturer in respect of his sale of goods or merchandise to the Export House or Trading House; and

(b) a certificate from the Export House or Trading House containing such particulars as may be prescribed and verified in the manner prescribed that in respect of the export turnover mentioned in the certificate, the Export House or Trading House has not claimed the deduction under this section:

Provided that the certificate specified in clause (b) shall be duly certified by the auditor auditing the accounts of the Export House

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or Trading House under the provisions of this Act or under any other law.

(4B) For the purposes of computing the total income under sub-section (1) or sub-section (1A), any income not charged to tax under this Act shall be excluded.

Explanation.--For the purposes of this section,--

(a) "convertible foreign exchange" means foreign exchange which is for the time being treated by the Reserve Bank of India as convertible foreign exchange for the purposes of the Foreign Exchange Regulation Act, 1973 (46 of 1973), and any rules made thereunder;

(aa) "export out of India" shall not include any transaction by way of sale or otherwise, in a shop, emporium or any other establishment situate in India, not involving clearance at any customs station as defined in the Customs Act, 1962 (52 of 1962) ;

(b) "export turnover" means the sale proceeds received in, or brought into, India by the assessee in convertible foreign exchange in accordance with clause (a) of sub-section (2) of any goods or merchandise to which this section applies and which are exported out of India, but does not include freight or insurance attributable to the transport of the goods or merchandise beyond the customs station as defined in the Customs Act, 1962 (52 of 1962).

(ba) "total turnover" shall not include freight or insurance attributable to the transport of the goods or merchandise beyond the customs station as defined in the Customs Act, 1962 (52 of 1962):

Provided that in relation to any assessment year commencing on or after the 1st day of April, 1991, the expression "total turnover" shall have effect as if it also excluded any sum referred to in clauses (iiia), (iiib) and (iiic) of section 28 ;

(baa) "profits of the business" means the profits of the business as computed under the head "Profits and gains of business or profession" as reduced by--

(1) ninety per cent. of any sum referred to in clauses (iiia), (iiib) and (iiic) of section 28 or of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits ; and

(2) the profits of any branch, office, warehouse or any other establishment of the assessee situate outside India ;

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(c) "Export House Certificate" or "Trading House Certificate" means a valid Export House Certificate or Trading House Certificate, as the case may be, issued by the Chief Controller of Imports and Exports, Government of India;

(d) "supporting manufacturer" means a person being an Indian company or a person (other than a company) resident in India, manufacturing (including processing) goods or merchandise and selling such goods or merchandise to an Export House or a Trading House for the purposes of export."

6. The provisions of the Act do not define the word "goods" or "merchandise". Hence, a reference to meaning of "goods" and "merchandise" as can be inferred from the law settled so far would be a guiding factor to decide the case on hand.

7. The Larger Bench of the Apex Court in Tata Consultancy Services v. State of A.P., (2005) 1 SCC 308, while testing whether the property involved in a transaction is "goods" for the purposes of sales tax, held as under:

"The term "goods" includes all types of movable properties, whether those properties be tangible or intangible. In India the test to determine whether a property is "goods" for the purpose of sales tax, is not whether the property is tangible or intangible or incorporeal. The test is whether the item concerned is capable of abstraction, consumption and use and whether it can be transmitted, transferred, delivered, stored, possessed, etc. The Intellectual property, once it is put on to a medium, whether it be in the form of books or canvas or computer discs or cassettes, and marked would become "goods". A software program may consist of various commands which enable the computer to perform a designated task. The copyright in that program may remain with the originator of the program. But the moment copies are made and marketed, it becomes goods, which are susceptible to sales tax. We see no difference between a sale of a software program on a CD/floppy disc from a sale of music on a cassette/CD or a sale of a film on a video cassette/CD. In all such cases, the intellectual property has been incorporated on a media for purposes of transfer. Sale is not just of the media which by itself has very little value. The software and the media cannot be split up. What the buyer purchases and pays for is not the disc or the CD. As in the case of paintings or books or music or films the buyer is purchasing the intellectual property and not the media i.e. the paper or cassette or disc or CD. Thus a transaction/sale of computer software is clearly a sale of "goods" within the meaning of the term as defined in the said Act. The term "all materials, articles and commodities" includes both tangible and intangible/incorporeal property which is capable of abstraction, consumption and use and which can be transmitted,

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transferred, delivered, stored, possessed, etc. The software programs have all these attributes."

8. The said view of the Larger Bench of the Apex Court was also adopted by a Three Judge Bench of the Apex Court in Bharat Sanchar Nigam Ltd. v. Union of India, (2006) 3 SCC 1.

9. From the law as enunciated from the decisions referred supra, "goods" may be tangible property or an intangible one. It would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold; and (c) capable of being transmitted, transferred, delivered, stored and possessed. If the above attributes are satisfied, the same would be goods.

10. In the cases on hand, the Commissioner of Income Tax (Appeals), after careful consideration of the facts of the case, found that the assessee exported music software and therefore, the transaction comes within the purview of Section 80HHC of the Act, and the said view was also also affirmed by the Tribunal. We are, therefore, satisfied that the attributes required for bringing the property involved within the meaning of "goods" is satisfied with reference to its utility; capability of being bought and sold; and capability of being transmitted, transferred, delivered, stored and possessed.

11. The above finding that the property involved is "goods" is fortified with the decision of this Court in Commissioner of Income Tax v. Superstar Music [2007] 291 ITR 8. Accordingly, we have no hesitation to hold that the assessee is entitled to deduction under Section 80HHC of the Act.

12.1. Alternatively, it is contended by Mrs.Pushya Sitaraman, learned Senior standing counsel for the Revenue that the deduction could be claimed by the assessee only under Section 80HHF of the Act, but not under Section 80HHC; and that since Section 80HHF of the Act providing deduction in respect of profits and gains from export or transfer of any film software, television software, music software, television news software, including telecast rights was inserted by the Finance Act, 1999, with effect from 1.4.2000, the assessee is not entitled to deduction even under Section 80HHF of the Act for the assessment years 1994-95 to 1997-98.

12.2. A contention made in the above lines, was carefully considered by the Division Bench of the Bombay High Court in Abdulgafar A.Nadiadwala v. Assistant Commissioner of Income Tax and Others, [2004] 267 ITR 488 and rejected.

12.3. Moreover, in view of the ratio laid down by the Apex Court in Tata Consultancy Services v. State of A.P. and Bharat Sanchar Nigam Ltd. v. Union of India, referred supra, we are of the considered opinion that merely because Section 80HHF came to be inserted with effect from 1.4.2000, that, by itself, does not mean the benefit of Section 80HHC

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could be denied to the transactions which are governed under Section 80HHC of the Act. Of course, it goes without saying that in view of the specific provision under Section 80HHF for deductions in respect of profits and gains from export or transfer of any film software, television software, music software, television news software, including telecast rights, the assessee could very well in future claim such deductions and the same would be taken care of under Section 80HHF(5) of the Act to prevent double benefits being claimed by the assessee in such events. However, in view of our clear finding that the transaction in question is covered under section 80HHC, it is inappropriate to hold that merely because Section 80HHF was not on the statute book during the assessment years in question, viz., 1994-95 to 1997-98, the assessee is not entitled to claim deduction without any hindrance under Section 80HHC in spite of compliance of the ingredients thereunder.

In the result, finding no substantial questions of law arising for our consideration, these appeals are dismissed. No costs. Consequently, M.P.Nos.1 of 2007 are also dismissed.

sd/-
Asst.Registrar

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Sub Asst.Registrar

ATR

1.The Assistant Registrar,
Income Tax Appellate Tribunal
Madras "A" Bench, Chennai.

2.The Secretary, Central Board
of Direct Taxes, New Delhi.

3.The Commissioner of Income
Tax (Appeals) XI, Chennai.

4.The Dy. Commissioner of Income-tax
Company Circle II(2), Chennai.

1 cc to Mrs.Pushya sitaraman Advocate SR.NO.35331.

VRK(co)
RD 25.7.07

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